Local 501, United Automobile, Aerospace and Agricultural Implement Workers of America *and* Cosimo S. Pace *and* Richard W. White *and* Frank A. Zagara and Bell Aerospace Textron, Division of Textron, Inc., Party to the Contract. Cases 3-CB-3975, 3-CB-4022, and 3-CB-4049

15 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 19 November 1982 Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, finding, and conclusions of the Administrative Law Judge, to modify his recommended remedy, and to adopt his recommended Order, as modified below.

We agree with the Administrative Law Judge that Respondent has violated Section 8(b)(1)(A) and (2) of the Act. The collective-bargaining agreement between Respondent and Bell Aerospace Textron, Division of Textron, Inc., provides for superseniority for "Members of the Executive Board and Shop Committee" for purposes of layoff, job downgrading, and shift preference. Respondent has agreed to remove the latter provision from the contract and our Order so provides. While superseniority benefits limited to layoff and recall may be accorded to stewards under *Dairylea Cooperative*, 219 NLRB 656 (1975), no superseniority benefits at all may be extended to union officials who, like the executive board members in this case who received superseniority with respect to job downgrading, are not engaged in grievance processing or other on-the-job contract administration duties. See *Gulton Electro-Voice*, 266 NLRB No. 84 (1983).

AMENDED REMEDY

In addition to the cease-and-desist and the make-whole remedy recommended by the Administrative Law Judge,[1] we shall additionally require Respondent to notify in writing both Bell Areospace Textron, Division of Textron, Inc., and employees Cosimo S. Pace, Charles Pace, Richard W. White, and Frank A. Zagara that it does not object to their reinstatement to the positions they held prior to the enforcement of the superseniority clause against them.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Local 501, United Automobile, Aerospace and Agricultural Implement Workers of America, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Maintaining and enforcing the clause in its collective-bargaining agreement with Bell Aerospace Textron, Division of Textron, Inc., which accords superseniority to its executive board members and other officials whose duties do not include grievance processing or other aspects of on-the-job contract administration."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Notify, in writing, Bell Aerospace Textron, Division of Textron, Inc., and employees Cosimo S. Pace, Charles Pace, Richard W. White, and Frank A. Zagara that it has no objection to reinstating these employees to the positions they held prior to the unlawful assignment of superseniority to union officials."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Board notes that counsel for the General Counsel averred at the hearing that Party to the Contract Bell Aerospace Textron, Division of Textron, Inc., has executed a settlement agreement covering companion 8(a)(1) and (3) charges in which it has agreed to joint liability for the make-whole remedy. Counsel for the General Counsel further averred in his brief to the Administrative Law Judge that, pursuant to the settlement agreement, employees Cosimo S. Pace, Charles Pace, Richard W. White, and Frank A. Zagara have been reinstated to the positions they held prior to the unlawful enforcement of the superseniority clause against them.

[2] *Dairylea Cooperative, supra.*

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

In the Bell Aerospace Textron, Division of Textron, Inc., plant in Wheatfield, New York, where our members are employed under the terms of an agreement between Bell Aerospace and Local 501,

United Automobile, Aerospace and Agricultural Implement Workers of America,

WE WILL NOT apply superseniority for shift preference and we will delete the provision permitting it from the agreement.

WE WILL NOT maintain or enforce any agreement with the Company giving superseniority to our executive board members or other union officials whose duties do not involve grievance processing or other aspects of on-the-job contract administration.

WE WILL NOT in any like or related manner restrain or coerce employees of Bell Aerospace in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL make whole, with interest, Cosimo S. Pace, Charles Pace, Richard W. White, and Frank Zagara for any loss of earnings they may have suffered by reason of the application of the superseniority clause, and WE WILL notify the Company and these employees, in writing, that we have no objection to their reinstatement to the positions they held before the unlawful assignment of superseniority to our executive board members.

LOCAL 501, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Buffalo, New York, on July 6 and 7, 1982. Upon charges filed on December 31, 1981, and March 22 and May 18, 1982, a complaint was issued on February 5 and amended on May 7 and June 18, 1982. The amended consolidated complaint alleges that Local 501, United Automobile, Aerospace and Agricultural Implement Workers of America (Respondent or the Union) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (the Act), by applying and enforcing a superseniority clause to the detriment of the Charging Parties. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF BELL AEROSPACE

Bell Aerospace Textron, Division of Textron, Inc. (Bell Aerospace), a Rhode Island corporation with a place of business in Wheatfield, New York, is engaged in the manufacture, sale, and distribution of hydroskimmers and related products. During the 12 months preceding the issuance of the complaint, Bell Aerospace purchased goods and materials valued in excess of $50,000 from suppliers located outside New York for delivery in New York State. Respondent admits that Bell Aerospace is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The facts are essentially not in dispute. On October 6, 1981, Bell Aerospace and Respondent entered into an agreement, section 80 of which provides under the caption "Top Seniority for Union Officials":

> Members of the Executive Board and Shop Committee shall hold the highest seniority in the plants covered by this agreement, and shall not be laid off as long as there are employees remaining on the job who are covered by this agreement. Such ranking seniority shall not be used for upgrading, choice of departments, or recall, but shall be used for downgrading within the job family in accordance with the job family chart from the job classification he was elected from. Shift preference will also be given on the same basis. Such ranking seniority shall only prevail if the Union officers mentioned are able to perform the available work.

Cosimo Pace was employed at Bell Aerospace's Wheatfield plant as a rocket mechanic. His job seniority date was March 22, 1978. On October 7, 1981, he was surplused and downgraded. Frederick Rudy, whose job seniority date was February 12, 1980, was retained in his position as a rocket mechanic even though he had less seniority than Cosimo Pace. This was because Rudy was guide[1] and executive board member of Respondent and

[1] Art. V, sec. 7(a), of Respodent's bylaws provides:

> It shall be the duty of the Guide to maintain order, inspect the membership receipts, satisfy himself that all present are entitled to remain in the meeting of the Local Union and perform such other duties as may be assigned to him from time to time. He shall assist the Sergeant-at-Arms in punching membership cards at each meeting. Upon request he shall advise the chairman regarding parliamentary procedure from Roberts Rules of Order.

In addition, art. 40, sec. 14, of the International constitution provides:

> It shall be the duty of the Guide to maintain order, inspect the membership receipts, satisfy her/himself that all present are entitled to remain in the meeting of the Local Union and perform such other duties as are usual to the office.

he exercised his superseniority to remain in the classification of rocket mechanic.

Charles Pace was also a rocket mechanic at the Wheatfield facility. His job seniority date was July 10, 1961. Although Charles Pace was the most senior employee in the department, on January 5, 1982, he was surplused and downgraded. Again, this was because Rudy exercised his superseniority as guide and executive board member.

Richard White was an employee in the job classification of factory clerk. He was surplused on January 12, 1982, and downgraded to the position of heavy laborer. His job seniority date in the classification of vehicle operator was May 8, 1978. Another employee in the job classification of vehicle operator was Joseph Rowell, whose job seniority date was March 17, 1980. Although White had more seniority than Rowell he was unable to bump Rowell. This was because Rowell held superseniority since he was a trustee[2] and executive board member. The evidence is uncontradicted that had Rowell not exercised his superseniority White would have bumped him out of the vehicle operator classification.

Frank Zagara's job seniority date was June 11, 1974. Thomas Abati, whose job seniority date was October 4, 1976, was a trustee and executive board member. Zagara was unable to bump Abati because Abati exercised his superseniority as trustee and executive board member.

John Diggins, Bell Aerospace's manager of labor relations, credibly testified that it is the union steward who handles first-level grievances. The second level of the grievance is handled by a shop committeeman. He further testified that the Company would not recognize a trustee or a guide in the grievance procedure in any step. The collective-bargaining agreement provides that stewards and committeemen receive paid time to be involved in the processing of grievances. There is no comparable provision for paid time in the handling of grievances by either trustees or guides. In addition, guides and trustees are not involved in the arbitration of grievances or in contract negotiations with the Company.

Casimir Walas, president of Respondent, credibly testified that the executive board meets twice a month and has the authority to represent Respondent between membership meetings. Each member of the executive board has an equal vote. As part of its functions, the executive board makes recommendations with respect to matters to be advanced in the collective-bargaining program. In addition, members who are dissatisfied with the handling of grievances have a right to appeal to the executive board.

Respondent maintains an office at the Wheatfield plant. The records maintained there include records of current grievances and current arbitration cases. Stewards and shop committeemen have keys to the office, but Walas conceded that Abati, Rowell, and Rudy do not have keys to the office. Walas further conceded that trustees and guides have not served on committees such as the fair employment practices committee, the safety and health committee, and the skilled trades committee, nor have they served as compensation representatives.

Rudy testified that he was elected as guide on May 8, 1980, and has been on layoff status since February 18, 1982. His job seniority date is February 24, 1966, and he was upgraded to rocket mechanic on February 24, 1980. While he testified that he had discussions with employees concerning such matters as vacation time, sick days, and pensions, he conceded that he had similar discussions before he became guide. He further conceded that he was not authorized to go to other employees' work stations and talk to them about work-related problems but that stewards did have that authority. He could not recall any instances when members were told to deal directly with him concerning problems that they may have had at the plant. In addition, he testified that he still holds the position of guide even though he has been laid off and he conceded that a guide has no direct duties inside the plant.

Based on the above, I find that the superseniority provision was applied to the detriment of Cosimo Pace, Charles Pace, Richard White, and Frank Zagara. I further find that stewards and committeemen were involved in the grievance procedure but that guides and trustees were not. In addition, I find that the executive board meets regularly and has authority to represent Respondent between meetings. Each member of the executive board has an equal vote, the executive board makes recommendations concerning bargaining, and members may appeal the handling of grievances to the executive board.

B. *Discussion*

1. Applicable law

The applicable law with respect to superseniority clauses, commencing with *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), and culminating in *American Can Co.*, 244 NLRB 736 (1979), enfd. 658 F.2d 746 (10th Cir. 1981), is set out in the Board's recent decision in *McQuay-Norris*, 258 NLRB 1397 (1981). Under *McQuay-Norris*, a two-fold test is applied. First, "union officers may not benefit from superseniority clauses except when they serve as stewards or otherwise engage in administration of the union contract at the place and during their hours of employment." Secondly, "if the General Counsel proves, without adequate rebuttal, that the functions of the union officers involved did not relate in general to the further-

[2] Art. 40, sec. 12, of the International constitution provides:

The Trustees shall have general supervision over all funds and property of the Local Union. They shall audit or cause to be audited by a Certified Public Accountant selected by the Local Union Executive Board, the records of the Financial Officers of the Local Union semi-annually as provided herein, using duplicate forms provided by the International Union, a copy of which shall be forwarded to the International Secretary-Treasurer immediately thereafter. It shall also be their duty to see that the Financial Officers of the Local Union are bonded in conformity with the laws of the International Union. The Trustees shall see that all funds shall be deposited in a bank subject to an order signed by the President and Treasurer and/or Financial Secretary. In Local Unions where safety deposit boxes are used, the Trustees shall see that the signatures of the President, Treasurer and one (1) of the Trustees are required before admittance to the safety deposit box is permitted. In the event the books are not received for audit within fifteen (15) days after the end of each six-month period, the Chairperson of the Trustees shall make a report to the next meeting of the Local Union for action.

ing of the bargaining relationship, the application of the clause becomes invalid" (*id.* at 1401). It thus appears that for the exercise of superseniority to be lawful the union officer must be engaged in the administration of the union contract or in the furthering of the bargaining relationship. This must be done "at the place and during [the] hours of employment." The rationale behind this latter requirement was explained in the concurring opinion of Members Jenkins and Penello in *American Can*, 244 NLRB at 739, as follows:

> *Dairylea* found that superseniority protection with respect to layoff and recall for union stewards was lawful because its objective was to retain on the job those union officials whose activities facilitate employee rights and whose *presence on the job* is required for the proper performance of this function (emphasis supplied).

In the instant proceeding neither of the two required tests was met. The functions of guide, trustee, and executive board member were not required to be performed "at the place and during [the] hours of employment." Indeed, Rudy testified that he had no duties as guide inside the plant and that he continued in his position as guide even though he had been laid off. In addition, Rudy, Rowell, and Abati were not involved in the administration of the union contract or bargaining relationship as contemplated by *McQuay-Norris*. They did not serve as stewards or committeemen and were not involved in the processing of grievances or in contract negotiations with the Company. They did not even possess keys to the union office at the Wheatfield plant.

McQuay-Norris also involved the duties of a guide and trustee in which a different local of the same union involved in this proceeding was the respondent. In *McQuay-Norris* both the guide and trustee were also members of their local's executive board and their duties were similar to the duties of Rudy, Rowell, and Abati, respectively. In that case the Board affirmed the Administrative Law Judge's finding that "Faust's job as guide was concerned with the organizational and internal functions of the union (local) itself, and not with contractual matters pertaining to bargaining and grievances, and the like" (258 NLRB at 1401). Similarly, the Board affirmed the finding that the trustee's duties were "solely internal, having 'general supervision over all funds and property of the Local Union'" (*id.*).

Accordingly, I find that the activities of Rudy, Rowell, and Abati do not meet the two-fold test of *McQuay-Norris*. The superseniority clause was unlawfully applied on their behalf, in violation of the Act, as alleged in the complaint.

2. Shift preference

The General Counsel argues that Respondent violated the Act by agreeing to a contractual clause which permitted superseniority in regard to shift preference. Both at the hearing and in Respondent's brief Respondent has agreed to remove that portion of section 80 which states "[s]hift preference will also be given on the same basis." I will so provide in the Order. Inasmuch as the remedy will provide for the removal of that phrase, it is not necessary for me to determine whether Respondent violated the Act when it agreed to such a provision.[3] Accordingly, it is not necessary that I determine whether the finding of such violation is barred by Section 10(b) of the Act as urged by Respondent.

CONCLUSIONS OF LAW

1. Bell Aerospace Textron, Division of Textron, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By applying superseniority to retain union guide and executive board member Frederick Rudy and union trustees and executive board members Joseph Rowell and Thomas Abati to the detriment of Cosimo Pace, Charles Pace, Richard White, and Frank Zagara, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Because union guide and executive board member Frederick Rudy and union trustees and executive board members Joseph Rowell and Thomas Abati were retained pursuant to an unlawful application of the superseniority provision of the collective-bargaining agreement, in derogation of the rights of senior employees, I find it necessary to order Respondent to make whole any loss of earnings suffered by those senior employees. The lost earnings shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[4]

As discussed above, Respondent has agreed to remove that portion of the superseniority provision which states "[s]hift preference will also be given on the same basis." The Order will so provide.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[3] In this connection I note Member Murphy's concurring opinion in *American Can*, 244 NLRB at 740, where it is stated, "I find *presumptively lawful* those clauses giving job retention superseniority—including layoff, recall, [and] shift assignment . . . for union stewards and officers whose functions relate, in general, to furthering the bargaining relationship" (emphasis supplied).

[4] See, generally, *Isis Plumbing Co.*, 138 NLRB 716, 717-721 (1962).

ORDER[5]

The Respondent, Local 501, United Automobile, Aerospace and Agricultural Implement Workers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining in its superseniority provision to the collective-bargaining agreement the phrase "[s]hift preference will also be given on the same basis" or words of similar import.

(b) Invoking, in any layoffs or recalls within the unit covered by an agreement with Bell Aerospace Textron, Division of Textron, Inc., at its Wheatfield, New York, facility, superseniority for other than a reasonable number of union officers whose duties involve the administration of the agreement, the processing of grievances, or the furtherance of the bargaining relationship, whenever such invocation results in the displacement of unit employees with greater seniority status under the agreement for purposes of layoff and recall, subject to other provisions regarding skill and ability.

(c) In any like or related manner restraining or coercing employees of Bell Aerospace Textron, Division of Textron, Inc., in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Cosimo Pace, Charles Pace, Richard White, and Frank Zagara for any loss of earnings they may have suffered in the manner set forth in the section above entitled "The Remedy."

(b) Post at its Wheatfield office and at its office at 3806 Union Road, Cheektowaga, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."